STATE OF MICHIGAN

COURT OF APPEALS

ZIAD NAGIA and LINDA C. NAGIA,

Plaintiffs-Appellants,

and

3D POLYMERS, INC.,

Plaintiff,

v

JAMES A. CHOTA and LINDA A. CHOTA,

Defendants-Appellees.

UNPUBLISHED
June 14, 2002

No. 229311
Oakland Circuit Court
LC No. 99-017532-CZ

Before: Bandstra, P.J., and Smolenski and Meter, JJ.

PER CURIAM.

In this action alleging minority shareholder oppression under MCL 450.1489, plaintiffs appeal as of right from trial court's order granting defendants summary disposition under MCR 2.116(C)(10). We affirm.

An appellate court reviews the grant or denial of a motion for summary disposition de novo to determine if the moving party was entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion for summary disposition under MCR 2.116(C)(10) tests the factual support of a claim. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). The moving party has the initial burden to support its claim for summary disposition by affidavits, depositions, admissions, or other documentary evidence. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The burden then shifts to the nonmoving party to demonstrate that a genuine issue of disputed fact exists for trial. *Id*. To meet this burden, the nonmoving party must present documentary evidence establishing the existence of a material fact, and the motion is properly granted if this burden is not satisfied. *Id*. at 362-363. Affidavits, depositions, and documentary evidence offered in opposition to a motion shall be considered only to the extent that the content or substance would be admissible as evidence. MCR 2.116(G)(6); *Maiden, supra* at 121. If the party opposing the motion fails to present documentary evidence establishing the existence of a genuine and material fact, the motion should be granted. *Smith, supra* at 454-455.

In challenging the trial court's grant of summary disposition, plaintiffs first argue that because they contested the validity of their signatures on the November 1995 agreement abrogating the pre-incorporation agreement and approving the sale of stock formerly held by James and Kenneth Willis, a genuine issue of material fact regarding the validity of that agreement, and thus the propriety of the Willis' stock sale, exists. However, as argued by defendants, given that redemption of the Willis' stock was permissible without the consent or approval of plaintiffs, the validity of that transaction is not an issue of fact preventing summary disposition.

Although plaintiffs are correct that Section 1 of the stock purchase agreement prohibits the disposition of any party's shares "without the written consent of all of the members of the Board of Directors . . . and the other Stockholders," this section further provides that, "[i]n the absence of such written consent, . . . the provisions of Section 2 shall govern." Therefore, accepting, as this Court must, plaintiffs' claim that their consent to the Willis' stock was not obtained, Section 2 of the stock purchase agreement governed the challenged sale. Although Section 2(A) requires that each shareholder receive notice of a proposed stock sale in the form of a written offer of sale, the corporation is nonetheless given the first option to purchase any such stocks under Section 2(A)(1). Contrary to plaintiffs' claims, however, nothing in this section, or any other section of the stock purchase agreement, requires plaintiffs' approval of such a sale before the corporation may validly redeem the offered shares. Therefore, even accepting plaintiffs' challenge to the validity of their signatures, and thus the absence of the notice required under Section 2(A), as true, plaintiffs were nonetheless powerless to affect the corporation's redemption of the Willis's stock in any manner. Accordingly, the validity of plaintiffs' signatures on the stock redemption agreement was not a "material" fact with respect to the validity of 3D's redemption of the Willis's stock and summary disposition of plaintiffs' claims with respect to that transaction was, therefore, proper. See *Crown Technology Park v D & N Bank, FSB*, 242 Mich App 538, 547; 619 NW2d 66 (2000) ("The dispute must be genuine *and* material." (Emphasis added)).

Plaintiffs appear to additionally argue that, because modification of the pre-incorporation agreement requires the written approval of all the parties thereto, plaintiff Linda Nagia's deposition testimony that her signature had been forged on the November 1995 agreement creates a genuine issue of material fact regarding the continued validity of the pre-incorporation agreement.[1] This argument was not, at least with any specificity, raised before the trial court and is therefore not properly before this Court on appeal. See *Environair, Inc v Steelcase, Inc*, 190 Mich App 289, 295; 475 NW2d 366 (1991) ("an issue not raised and addressed in the trial court is not preserved for appeal"). Nonetheless, contrary to plaintiffs' assertion, nothing in the pre-incorporation agreement required that all parties consent, in writing or otherwise, to subsequent modifications of that agreement. Moreover, in order to establish a claim for minority shareholder oppression under MCL 450.1489, plaintiffs were required to establish "illegal or

[1] We find plaintiff Ziad Nagia's claim that, although he signed the November 1995 agreement, the agreement should not bind him because he was unaware of the document's substance, to be without merit. It is a well-established principle that a party signing an agreement is deemed to know its contents, and may not claim ignorance to avoid the instrument. *Scholz v Montgomery Ward & Co, Inc*, 437 Mich 83, 92; 468 NW2d 845 (1991).

wilfully oppressive" conduct by a director or "others in control" of the corporation. Although Linda Nagia testified at deposition that she believed it was defendant James Chota who had committed the claimed forgery, she could offer no basis for her opinion in this regard, and plaintiffs offered nothing further on this issue. Accordingly, we conclude that plaintiffs failed to offer sufficient evidence of defendants' involvement in the claimed forgery to prevent summary disposition of this issue in favor of defendants. *Smith*, *supra*.

Summary disposition of plaintiffs' claim that defendants violated the terms of the pre-incorporation agreement by amending the corporation's bylaws so as to reduce the number of directors from two to one without plaintiffs' consent or knowledge was also appropriate. In support of their claim in this regard, plaintiffs argue that under Section 7 of the pre-incorporation agreement, any such amendment of the bylaws could occur only upon an affirmative vote of sixty percent of the shareholders. However, even assuming the continued validity of that agreement, proper amendment of the bylaws is not, as argued by plaintiffs, dependent upon an affirmative vote of sixty percent of the *shareholders*, but rather of "*the issued and outstanding* ***shares*** . . . ." Thus, upon redemption of the Willis's shares, defendant James Chota, as the holder of approximately seventy-eight percent of the outstanding shares, had the power to amend the bylaws to reduce the number of directors without plaintiffs consent.

In any event, plaintiffs have offered no evidence that the corporation's bylaws were ever so amended.[2] Although there is evidence of record suggesting that, following James Willis' resignation from the board, defendant James Chota acted for a period of time as "sole director," the bylaws as originally enacted contemplate that such vacancies may occur, and provide procedures for the filling of such vacancies. Moreover, plaintiffs cite no evidence indicating that James Chota remains the sole director of 3D Polymers.

Plaintiffs have similarly failed to support their claim that defendants failed to distribute an appropriate amount of dividends. The pre-incorporation agreement executed by the parties provided that, so long as the promissory notes issued by 3D to the parties remained unpaid, 3D would be restricted to distributing dividends in an amount sufficient to merely meet the parties' tax obligations on their proportionate share of the corporation's income. In seeking summary disposition, defendants provided the trial court with an opinion letter issued by an independent accounting firm, stating that plaintiffs had in fact received approximately $56,000 more in dividends than required to meet their tax obligations. Aside from their own conclusory opinions, however, plaintiffs offered no evidence contradicting that offered by defendant, or showing that these dividends were not an appropriate or reasonable amount.

Opinion letters recommending an increase in James Chota's base salary, as well as a substantial bonus, were also submitted by defendants in response to plaintiffs' claim that Chota had violated both the pre-incorporation agreement and his fiduciary duty to plaintiffs by providing himself with a substantial increase in compensation. These letters, which were prepared by two independent accounting firms that undertook a review of 3D's financials, each recommended that Chota's base salary be increased to approximately $240,000, and that he

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[2] The bylaws attached as an exhibit to plaintiffs' brief in opposition to summary disposition retain the two-director requirement.

receive a one-time bonus of approximately $487,000 as compensation for under-payment for the years 1996 to1998.[3] Again, plaintiffs offered nothing in the way of admissible evidence to contradict these conclusions, or to otherwise indicate that these increases were unreasonable, and, accordingly, failed to establish a genuine issue of fact preventing summary disposition of these claims.

Finally, although plaintiffs additionally argue that an issue of fact remains concerning the adequacy of business records provided or otherwise made available to them, we note that this issue was not presented in plaintiffs' statement of questions presented and is, therefore, not properly presented for appellate review. See MCR 7.212(C)(5); *Bouverette v Westinghouse Electric Corp*, 245 Mich App 391, 404; 628 NW2d 86 (2001). Nonetheless, plaintiffs acknowledged during deposition that, since initiation of this suit, defendants have provided them with a number of financial documents relating 3D's operations. Aside from the corporation's 1999 financial statements, which defendants assert have since been provided, plaintiffs have failed to identify with any specificity any further documents to which they are entitled. Nor do they cite to any statute or portion of the relevant agreements between the parties requiring that such documents be provided to them, with or without request. Accordingly, plaintiffs have again failed to meet their burden of producing evidence establishing a factual dispute preventing summary disposition.

We affirm.

/s/ Richard A. Bandstra
/s/ Michael R. Smolenski
/s/ Patrick M. Meter

[3] On December 15, 1999, Chota, as sole director of 3D Polymers, issued a resolution implementing the firms' recommendations.